IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 25TH OCTOBER 2007 / 3RD KARTHIKA 1929

WP(C).No. 27876 of 2006(R)

AGAINST THE ORDER IN EA.1343/04 IN EP.73/02,
OS.207/1987 of I ADDL.SUB COURT,TRIVANDRUM
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PETITIONER:

THE FEDERAL BANK LIMITED,
ALWAYE - MOUNT ROAD BRANCH, CHENNAI,
REPRESENTED BY ITS ASST. GENERAL MANAGER.

BY ADV. SRI.MOHAN JACOB GEORGE
SMT.P.V.PARVATHI
SMT.REENA THOMAS
SRI.TITUS THOMAS
SRI.L.RAM MOHAN

RESPONDENTS:
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1. GIRIJA DEVI, W/O. V.RAJASEKHARAN NAIR,
AZIZ MULK II STREET, THOUSAND LIGHTS,
CHENNAI-6.

2. KOMALAKUMARI AMMA, W/O LATE
SOMASEKHARAN NAIR, MEENAKSHI BHAVAN,
CHADIYARA, POOJAPPURA, THIRUVANANTHAPURAM.

BY ADV. SRI.L.MOHANAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Appendix

Petitioner's Exts:

Ext.P1 copy of the judgment in O.S No.207/1987 of the Sub Court, Thiruvananthapuram.

Ext.P1(a) copy of the decree in OS 207/1987 of the Sub Court, Thiruvananthapuram.

Ext.P2 copy of Execution Petition filed as EP.No.73/2002 in O.S.No.207/1987 of the Sub Court, Thiruvananthapuram.

Ext.P3 copy of the memo and notice form etc. submitted by the counsel for decree holder in OS 207/1987 before the Sub Court, Thiruvananthapuram.

Ext.P3(a) copy of the certified copy of the proceedings sheet of EP 73/2002 in OS 207/1987.

Ext.P4 copy of the affidavit filed by Advocate Mr.S.Sreekumar.

Ext.P5 copy of the Review Petition No.EA 1343/2004)

Ext.P6 copy of the objection submitted by JD 3.

Ext.P7 copy of the order dated 15.7.2006 passed by the Sub Court, Thiruvananthapuram dismissing the Review Petition.

M.N.Krishnan, J.

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W.P(C).No.27876 of 2006

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Dated this the 25th day of October, 2007.

JUDGMENT

This Writ Petition is filed seeking to set aside Ext.P7 order of the First Additional Sub Judge, Thiruvananthapuram. Decree holder moved an application for restoring the Execution Petition, which was dismissed for default on the ground that it did not take steps to complete service on third judgment debtor in the case. The court below held that the disposal is under Order 21 Rule 105 of C.P.C. and therefore it will be governed by Order 21 Rule 106 of C.P.C. and as the petition is filed beyond the period of 30 days and as the Executing Court has no power to condone the delay, it dismissed the application. It is against the above decision that the present Writ Petition is filed.

2. Learned counsel for the writ petitioner has drawn my attention to the decision reported in **Radhakrishnan** v. **State of Kerala** - 2006(1) K.L.T. 28. In the said decision, this Court found that the Execution Petition was not dismissed on the date

when it was posted for hearing and therefore, it was not a disposal of the matter under Order 21 Rule 105 of C.P.C. and therefore Order 21 Rule 106 of C.P.C. will not apply and so as there is no other provision, the court can invoke Section 151 of C.P.C. for restoring the Execution Petition and passed an order accordingly. On the contra, learned counsel for the respondents had drawn my attention to another decision of this Court reported in **Cleetus** v. **South Indian Bank** - 2007 (3) K.L.T. 868. Relying on the said decision, the learned counsel would contend that any application pending will come within the purview of Order 21 Rule 105 of C.P.C. and that all the Rules under Order 21 Rule 1 to 104 of C.P.C. can be extended and therefore when a matter is dismissed, it amounts to a disposal under Order 21 Rule 105 of C.P.C. and therefore, Order 21 Rule 106 of C.P.C. will be attracted. Learned counsel also had drawn my attention to the decision reported in **Damodaran Pillai** v. **South Indian Bank Ltd.** - 2005(4) K.L.T. 192 where the Apex Court held that the Limitation Act is not applicable to a proceeding under Order 21 of C.P.C. In the said decision in paragraph 17, the court gave the reason that when there is a

specific provision in the C.P.C., it is that provision which has to be noted and not Section 151 of C.P.C.

3. Now the question that arises for consideration is whether Order 21 Rule 105 of C.P.C. would be applicable to the present case. Order 21 Rule 105 very specifically starts with the heading "Hearing of application". It is further stated therein that the court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application. Order 21 Rule 105(2) contemplates a situation where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed. So, a close reading of Order 21 Rule 105 of C.P.C. makes it very clear that the court should have fixed a date for hearing of the application. There is difference between a case posted for hearing and otherwise is also seen from paragraph 19 of the decision reported in **Damodaran Pillai** v. **South Indian Bank Ltd**. - 2005(4) K.L.T. 192. The Supreme Court held thus: "Therein the Execution Application was dismissed on a day which was not fixed for hearing."

4. Now we will refer to the facts of this case. There is no case for the respondents that the matter was posted for hearing. I had perused the proceeding papers available before me. The court continuously posted it for steps and on 20.9.2004 no steps were taken against JD 3 and the operative order reads as "Since no steps are taken on JD3 I am unable to proceed with the EP. EP is dismissed. No costs." So the disposal of the Execution Petition was for not taking steps against JD 3 and it was not on a day the case was posted for hearing. Therefore I hold that Order 21 Rule 105 of C.P.C. will not apply to the present case and as laid down by this Court in the decision reported in **Radhakrishnan** v. **State of Kerala** - 2006(1) K.L.T. 28. Section 151 of C.P.C. will come into play for which there is no limitation and therefore an application for restoration is maintainable. Then as far as this case is concerned, the petition is filed within a period of 40 days from the date of dismissal and there is no gross negligence or grave misconduct on the part of the decree holder and the decree holder is very much interested to get the decree amount realised from the judgment debtors.

5. Therefore, I feel that this is a fit case where the order

dismissing the Execution Petition for default is to be set aside and the E.P. to be restored and the court below be directed to give proper opportunity to the decree holder to take steps against JD 3 and proceed with in accordance with law. I direct so. The matter is remitted back and the parties are directed to appear before the court below on 30.11.2007.

Writ Petition is disposed of accordingly.

M.N.Krishnan,
Judge.

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